DUE PROCESS OF LAW AND THE EIGHT-HOUR DAY.

THE actual words of the Fourteenth Amendment are these: "nor shall any state deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." In the Fifth Amendment the last clause is omitted. In the Constitution of Massachusetts, "Part the First, XII," are the words, "And no subject shall be arrested, imprisoned, despoiled, or deprived of his property, immunities, or privileges, put out of the protection of the law, exiled, or deprived of his life, liberty, or estate, but by the judgment of his peers, or the law of the land." In the Petition of Right, 3 Car. I, c. 1, 1628, IV, it was recited that in the 28th of Edward III it had been enacted that no man "should be put out of his land or tenements, nor taken, nor imprisoned, nor disherited, nor put to death without being brought to answer by due process of law." Finally Magna Carta in the twenty-ninth chapter has it: "No Freeman shall be taken or imprisoned, or be disseised of his freehold or liberties, or free customs, or be outlawed, or exiled, or any otherwise destroyed; nor will we pass upon him, nor condemn him, but by lawful judgment of his Peers, or by the Law of the Land." Lord Coke's gloss[1] reads: "1. That no man be taken or imprisoned but per legem terrae, that is, by the Common Law, Statute Law, or Custom of England."

The history of how these declarations came to apply to statutes passed by representative assemblies is not of consequence now, for they have come so to apply beyond peradventure. It is also not of consequence that the "liberty" guaranteed by the Fourteenth Amendment has come to mean the right to pursue one's individual purposes as one likes and to make contracts for that end. There can be little doubt that so to construe the term "liberty" is entirely to disregard the whole juristic history of the word.[2] At present the construction which includes within it the

[1] 2 Inst. 45 *et seq.*

[2] Mr. Charles E. Shattuck in 4 HARV. L. REV. 365. Mr. E. Parmalee Prentice in his book on the Commerce Clause seeks to support historically the modern interpretation, but the instances he gives are either literary or philosophical, or they seem to

"liberty" to make such contracts as one wishes has become too well settled to admit of question without overturning the fixed principles of the Supreme Court.[1] If it was, as it seems to me, an usurpation, successful assertion has sealed its title, and we need not quarrel with it, unless we are historically inclined or prone to revolutions.

But the meaning of the words "due process of law" or "the law of the land" has not become settled.[2] Consequently, when a law forbids all persons or a class of persons to make contracts exactly as they like, we may know certainly that it does "deprive" them of their "liberty," but we may not certainly know whether such deprivation was "due process of law." Much has been written about this, but I mean to consider only what "due process of law" means when the statute has regulated the hours in a day or week during which specified classes of persons may contract to work.

First, the words might mean that "due process of law" was only "customary or common process of law." When applied to legislative acts, from that aspect it can only mean, whether the subject-matter was such as was usually and commonly regulated by legislatures in those communities from which we have inherited our law. If it was common and accepted for the legislature to control the wage contract, then a statute affecting the wage contract was "due process of law." If that were the test, all such statutes would be valid, because it has been a common form of statutory regulation for several centuries.[3] It is true that such regulation has commonly been directed towards regulating wages, but no one would distinguish between the right to fix wages and that to fix the hours of work.

With the beginning of the nineteenth century and the spread of those ideas of governmental non-interference which used to be

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distinguish between freedom from personal restraint and other ideas. Mr. Shattuck's article in this REVIEW leaves no reasonable doubt of the meaning of the word as used in constitutional law at the end of the eighteenth century.

[1] Booth *v.* Illinois, 184 U. S. 425; Lottery Case, 188 U. S. 321, 357; Allgeyer *v.* Louisiana, 165 U. S. 578.

[2] Davidson *v.* New Orleans, 96 U. S. 97; Ballard *v.* Hunter, 204 U. S. 241, 255.

[3] 5 Eliz., c. 4; 20 Geo. II, c. 19; 31 Geo. III, c. 11, § 3; 6 Geo. III, c. 25. While the subject of workmen's "conspiracies" was of course quite distinct, it still has enough relation to the matter of wages to make the subject-matter of near kin to their regulation. 33 Edw. I, st. 2; 3 Hen. VI, c. 1; 39 & 40 Geo. III, c. 106. Apparently the first statute for the regulation of wages by the Justices of the Peace was 5 Eliz., c. 4.

called *laisser faire*, the dominant economic theory forbade any regulation of the wage contract. The conditions of factory life, at first in England and later in this country, soon forced the hand of the more doctrinaire economists, and we began to have statutes regulating the conditions of factory life and of life in mines. Logically it would have been impossible under the theory of the *laisser faire* economists to defend such regulations, for they indubitably "deprived" the worker of his "liberty" to work under such conditions as he saw fit. The only process of law accorded him was the fiat of the legislature which forbade him and his employer to contract as they pleased.

To distinguish between the regulation of the conditions of factory life and the regulation of the hours of labor required one of two courses: either the court must have abandoned the theory that the customary character of the legislation determined its constitutionality; or it must have held that, though the regulation of such general conditions was customary, the regulation of the hours of work was not. But the regulation of such conditions was not customary prior to the nineteenth century, because, largely speaking, there were no factories. Besides, the theory of the customary powers of the legislature does not mean that a precise precedent must be found for every statute. The regulation of the wage contract in respect of the amount of wages was certainly a valid precedent for its regulation in respect of the hours of labor, if it was a precedent for its regulation in respect of the general conditions of factory life.

The actual result has been the acceptance of the first alternative and the interpretation of "due process of law" in quite another sense from that suggested. There have been many decisions[1] construing the words as meaning the usual and customary process of law, but, in regard to statutes regulating the wage contract, the question of the customary character of the regulation is no longer considered except in the case of seamen's contracts.

In abandoning this interpretation of the words, there arises, however, this difficulty, that the courts will not concern themselves, or at least profess not to concern themselves, with the expediency

[1] Murray *v.* Hoboken Land Co., 18 How. (U. S.) 272; Head *v.* Amoskeag Mfg. Co., 113 U. S. 9; Warts *v.* Hoagland, 114 U. S. 606; Robertson *v.* Baldwin, 165 U. S. 275; St. Louis & San Francisco Ry. *v.* Mathews, 165 U. S. 1; Patterson *v.* Bark Eudora, 190 U. S. 169.

or propriety of the statute in question, which they insist must always remain a question for the legislature only. The judicial declarations upon this matter leave no shadow of doubt as to its recognition.[1]

Therefore some other test must exist than the judgment of the court upon the wisdom of the particular act in question. The obvious alternative was to assert that there were certain subject-matters of possible control within which the legislature was free to act as it thought best, and that when it passed an act which in fact did regulate those matters the act was due process of law. At first the courts said that in matters which actually, and not merely colorably, affected the public health and morals, or safety,[2] the legislature might act as it thought best and the courts could not declare their statutes not to be due process of law. But it soon became apparent that if the legislature was in fact forbidding the freedom of contract in relation to matters not within the fair meaning of the public health and safety, either the scope of that meaning must be enlarged, or the legislature would be shorn of its power to do many things which were highly necessary. Under the stress of this compulsion the court therefore enlarged the scope of that meaning, until at the present time it has been defined as including the public "good" or "welfare" in general, and even the public "prosperity" or "convenience."[3]

Unless, however, the terms "welfare" and "convenience" are to be defined so arbitrarily and unreasonably as to leave no basis for their general application and therefore to make them inapt for use as principles of guidance, it is clear that they include all those matters which the legislature can desire to regulate at all. It is true that in the supposed furtherance of the public welfare and convenience the legislature may enact what has in fact the precise opposite of the effect which they intend, and that they may, indeed, make that "welfare" and "convenience" the mere color for stat-

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[1] Mugler *v.* Kansas, 123 U. S 623; Crowley *v.* Christensen, 137 U. S. 86; Atkin *v.* Kansas, 191 U. S. 207, 223; Cotting *v.* Kansas City Stock Yards, 183 U. S. 79, 110.

[2] Mugler *v.* Kansas, 123 U. S. 623; Booth *v.* Illinois, 184 U. S. 425; Powell *v.* Pa., 127 U. S. 678; Jacobson *v.* Mass., 197 U. S. 11; Mo. Pac. Ry. *v.* Mackey, 127 U. S. 205; Barbier *v.* Connolly, 113 U. S. 27; New York, etc., R. R. Co. *v.* Bristol, 151 U. S. 556; Johnson *v.* So. Pac. Co., 196 U. S. 1.

[3] Escabana Co. *v.* Chicago, 107 U. S. 678; St. Louis Iron Mountain Ry. *v.* Paul, 173 U. S. 404, 409; Lake Shore & Mich. So. Ry. *v.* Ohio, 173 U. S. 285, 296, 297; Lochner *v.* People, 198 U. S. 45, 57; C. B. & Q. Ry. *v.* Drainage Comrs., 200 U. S. 561, 592; Bacon *v.* Walker, 204 U. S. 311.

utes by which they corruptly mean to accomplish no result of the kind. In the first case, however, the court must consider the expediency of the statute, which they have so often declared they should not do; and in the second they must question the integrity of a coördinate branch of the government, as to which there is an obvious and insuperable impropriety.

The logic of this situation made necessary, therefore, some further principle of interpretation for the words, "due process of law," than that based upon the definition of certain general fields of legislative power within which the legislature might act freely, and the court have nothing to say. If there were no such added principle of determination, the court must abdicate its function of declaring a statute not "due process of law," — provided no arbitrary methods of its administration were prescribed — or it must return to the interpretation of which Murray *v.* Hoboken Land Co.[1] was an instance, and only examine whether the legislature was in fact acting as legislatures had always been accustomed to act in English-speaking communities. To adopt the second of these would have been to abandon precedents at that time established, and it would have been in addition — and this was more important — to have admitted the validity of much legislation which the justices were personally convinced was erroneous economically, and despotic politically.

There was in fact no alternative, therefore, but to take the bull heroically by the horns and declare that the court could and did have the power to examine the expediency of the measure and to determine whether it had in fact in their judgment any relation to the purposes and objects which it was designed to effect, and, as those purposes and objects were not ordinarily set forth, to any purposes and objects which the court recognized as legitimate. The court did do this frankly enough, and the necessary result has been great divergence of constitutional decision and an apparent absence of actual principle upon which such cases can be determined.

It is not, however, necessary that the consideration by the court of the expediency of a statute should be such as would be given if the whole question were before it as a legislature in the first instance.[2] It may well determine those things to be within the range of legislative power against which, sitting as legislators, the

[1] 18 How. (U. S.) 272.

[2] Mugler *v.* Kansas, 123 U. S. 623; Booth *v.* Illinois, 184 U. S. 425, 430; Otis *v.* Parker, 187 U. S. 606.

justices individually would have voted. The nearest analogy for the function of the court is the function of a court in review of a verdict on the facts. Only in those cases in which it is obvious beyond peradventure that the statute was the result, either of passion or of ignorance or folly, can the court say that it was not due process of law.[1] In this way the principle may be observed that with the expediency of the statute the court has no concern, but only with the power of the legislature.

There will, I believe, be little difference of opinion as to the analysis hitherto of the court's position in regard to the interpretation of "due process of law." The question is not so much of the principle as of its application. It would be out of place in this paper to consider the political results of this function of the court as so developed, for the question goes far beyond the mere matter of eight-hour laws. Whether it be wise or not that there should be a third camera with a final veto upon legislation with whose economic or political expediency it totally disagrees, is a political question of the highest importance. In particular it is questionable whether such a power can endure in a democratic state, while the court retains the irresponsibility of a life tenure, and while its decisions can be reversed only by the cumbersome process of a change of the federal Constitution. While there seems to be no question of the desirability of the judicial irresponsibility arising from life tenure — a tenure indeed which it would seem as though no judge could fail to desire and, if he could, to insist upon — and while there can also be little question of the undesirability of turning a constitution from the fundamental frame of government into a statutory code, still, if the court is to retain the absolute right to pass in the final result on the expediency of statutes passed by the legislature, the difficulty is inherent and in the end it may demand some change, either in the court or in the Constitution.

The question of the applicability of the theory, as it has been developed, to eight-hour laws must unfortunately depend upon the temper in which the justices constituting the court actually approach the question. If the decision is to depend in each case upon the opinion of the members of the court as to whether the ends sought by the statute are in themselves desirable, and as to whether the means prescribed are well adapted to those ends, it is clear that

[1] Henderson *v.* Mayor, 92 U. S. 259, 268; Minnesota *v.* Barber, 136 U. S. 313, 320; Hennington *v.* Georgia, 163 U. S. 299, 304; Booth *v.* Illinois, *supra*; Jacobson *v.* Mass., 197 U. S. 31.

the decisions in one case have little value as precedents in another. Further, it is clear that if certain justices have fixed opinions upon economic theories, they must necessarily be opposed to any statutes which violate those theories, and that they will be justified in continually voting in accord with those theories. A vote of the court necessarily depends not upon any fixed rules of law, but upon the individual opinions upon political or economic questions of the persons who compose it, and though in the course of time precedents will be established upon a large number of questions, to which presumably thereafter all members of the court will give the deference due to decisions, those precedents will not have the force of instances of a general principle, but of precedents upon precisely the questions which were decided. While there is perhaps nothing inherently or inevitably necessary in such a result, since the court might extend the logical consequences of a decision beyond the precise question which it decided, yet, in fact, the result has been otherwise, as may be shown by the decisions themselves.

Under the definition of "liberty" which is now the law, a statute which provides that no men engaged in a particular trade shall work for more than eight hours, except in special emergencies, must of course come within the Fourteenth Amendment, unless the act be due process of law. That question is whether or not the court can see any reasonable relation to any purpose which reasonable men may think desirable for the public welfare. If the court can see such a purpose, then it must hold that there has been due process of law; if not, the law is, of course, void.

Under strict Benthamite theory, all such laws were idle and vicious: idle, because the whole wage contract was controlled by factors over which the collective will of the community had no control; vicious, because it put restraint upon the "natural" and inevitable adjustment of industry. But that theory was necessarily abandoned by the courts when they tolerated many statutes regulative of the wage contract, not only when the regulation concerned "health" and "safety," but even when it sought to make more equal the relative economic advantages of the two parties to the wage contract.[1] Such laws, quite as much as laws regulating hours or wages, take from the individual his right to determine for himself the terms under which he may be willing to contract.

[1] Missouri Pac. Ry. Co. *v.* Mackey, 127 U. S. 205; Knoxville Iron Co. *v.* Harbison, 183 U. S. 13; St. Louis Iron Mountain Ry. *v.* Paul, 173 U. S. 404. See Holden *v.* Hardy, 169 U. S. 366, 397; Schlemmer *v.* Buffalo, etc., Ry., 205 U. S. 1.

They put into the power of the legislature and its agents the control of his "liberty" to do as he likes with his own.

In short, it is too late for the adherents of a strict *laisser faire* to condemn any law for the sole reason that it interferes with the freedom of contract. Similarly it is no reason to declare invalid such acts because they may work to the disadvantage of individuals of exceptional strength or skill, a favorite reason given by some judges for such decisions. If this were a reason, it must apply equally to the statutes which prescribe safety appliances, which are often unnecessary for individuals of unusual prudence and watchfulness; and it must also apply to many sanitary statutes which prescribe minimum conditions of healthfulness, which are unnecessary to persons of singular robustness.

Each case must depend, therefore, on the particular purpose which it serves and the means adopted to fulfill the purpose.

An eight-hour law does not in fact aim solely at protecting the health of the employees. But it does not follow that, because the statute has a different actuating purpose, it has no true effect upon the health of those whom it touches. Sixteen hours of work would of course be more than any but the strongest could endure. Twelve hours under most factory conditions would probably be too much for the preservation of the health of most men, and would result, as unhappily most conditions of working life do result, in a premature ageing of those who assume it. Just what the limit is which will permit the worker best to preserve his vigor and to allow him the variety of activity and the relief from the monotony of specialized labor which is essential to actual health, is a difficult question to answer. No doubt the only answer possible could be found from extended statistical inquiries for which it is quite likely that the materials are not now at hand. But under the principles laid down by the court, it is neither essential, nor indeed relevant, to answer such an inquiry; for if the regulation has any possible relation to the correct solution, then the judicial question is answered and closed.

It seems very strange that a court should have decided that the limit of eight hours had in fact no such relation and could have no justification as a possible limit to put upon a working-day.[1] It is not of course in the least strange that a court should regard an act which put such a limit upon a working-day as inexpedient, or

[1] Lochner *v.* People, 198 U. S. 45.

unwise, because that is a matter upon which men differ very widely, just as they do upon the policy which would make any regulation whatever of the working-day, or of the mode of payment, or of the amount of wages. However, to repeat the distinction, it is one thing to disapprove the measure, and another to put it outside the pale of rational entertainment.

The consideration of the effect upon the health of the persons affected is, however, by no means the only one which is relevant, because, as we have seen, if the measure may possibly promote the "welfare" of the public, then it is valid. There would seem to be so direct a relation between the welfare of a worker and the hours of his work that no doubt could be raised about it, yet in Lochner *v.* People [1] it was held that it did not exist. It is clear that so to hold, the court must have included within the term "welfare" the question whether on the whole the class affected would be benefited or hurt. Muller *v.* Oregon [2] and Holden *v.* Hardy [3] went directly upon the fact that the hours of labor had an effect upon health, at least among women or miners and smelters; it was not necessary after deciding that to consider whether the act affected the "welfare" of the workers. But in Lochner *v.* People it was first held that the limitation of the working day did not affect the health of bakers as it did of miners and smelters; and then it was necessary to hold that it had no relation as well to the general "welfare" of the bakers. No reason for such a decision can exist except that upon the whole the class affected will do better without legislative regulation of any sort than with it.

That is, there can be no question that such a regulation actually affects the "welfare" of the persons within its terms; but there may well be a question whether, all things considered, it affects them beneficially, or, if beneficially, whether it does not do so at a corresponding expense arbitrarily imposed upon other persons. In other words, it cannot be urged that the subject-matter is not within legislative purview, but it may be urged that the legislature has acted improperly within its proper field. But it must be shown that the "welfare" of the persons affected was so clearly and obviously injured, or, if furthered, was so unjustly furthered, that no one could reasonably believe it expedient; in other words, that it was either absurd or oppressive.

If, however, such a statute is of no more oppressive or absurd

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[1] 198 U. S. 45. [2] 208 U. S. 412. [3] 169 U. S. 366.

a character than others of admitted validity, it is not void. It is therefore unnecessary to examine the expediency, even with the most favoring eye, of such a statute, except relatively.

To shorten one's hours of routine manual work is of itself a benefit, unless it entails a corresponding diminution of pay. To insure one's safety and health might be no greater benefit, to which it would also be a drawback if the pay were decreased. Whether or not a decrease of wages would counterbalance a reduction of hours depends upon the degrees of each, and it is the same question whether such a decrease would counterbalance certain regulations for health or safety. That the state should take out of the individual's hands his choice as to the working conditions of his life, many no doubt would regard as "a meddlesome interference with the rights of the individual," if it correspondingly reduced his pay. That it should forbid him to work, for instance, fourteen hours a day, would certainly be no more despotic or unwarranted. As between the two, judged merely by the kind of matter which is regulated, there is no reason for permitting the one which does not hold good of the other in a proper case. A man's "time" is his life, and to control it is to control what is often dearer to him than his health or his personal safety. Even if the legislature were limited in its power over "liberty" to the subjects of "health" and "safety," there would not be a valid ground of distinction, but as it is not — nor indeed can it be — there is no such inevitable disproportion of interest between the hours of work and health and safety as makes the one indifferent, and the other vital, to the wage-worker.

But may it not be that to cut down the hours of work is to force those who work to take less pay for an enforced leisure they may not want? Perhaps so, but the same reasoning applies in the case of safety appliances and factory regulation. In the first case, if the worker is paid in proportion to his production, he will lose in pay what he gains in time. In the second case, upon the same reasoning, the cost of factory regulation raises the price of the commodity, and so shuts off a part of what economists call the "effective demand." Whether that kind of reasoning is as true as Holy Writ, or whether it is a vain scholastic exercise, it is applicable to either case, and shows that in both the worker pays for what he gets.

And if it is so, there seems no good reason why the state should not compel the exchange of a shorter day for shorter wages, if it

may compel an exchange of a safer work-shop for such wages. No doubt, each is "paternal," but "ce n'est que le premier pas qui coûte," and that was taken long since.

Suppose, however, that the theory may not be true that such regulations must be paid for *pro tanto* in a reduction of wages. It may be that every advantage in living conditions generally brings with it a corresponding increase in efficiency, or, if not a corresponding, at least some, increase. This is the trades-unionist theory,[1] and no one can with justice dismiss it with an appeal to the "interference with the rights of the individual," who will not go to the consistent extreme and condemn all such interferences generally. That such a theory may conceivably be true ought to be conceded. The indirect effects upon the morale of workers and the stimulus to improvement in the technique of the arts arising from a shorter day may indeed be enough to make up economically for their apparent decreased production. If so, then, viewed from the most narrow economic effects, the total result of the restriction will be beneficial to their welfare, and will entail no corresponding injury to any one else. This is an opinion which certainly may be entertained, and that, I submit, is as far as the court can inquire.

If, however, the theory be wrong — and it certainly is as yet quite unproved — and if the resultant loss be made to fall upon the capitalist — as the more militant trades-union theory asserts — is that fact enough to make the statute invalid? If so, there must be some constitutional necessity that the state should leave untouched the whole economic struggle. That is, however, not the case, as the laws against usury alone prove beyond question.[2] Even

[1] Sidney and Beatrice Webb, Industrial Democracy, Pt. III, c. III, (*b*) 715–740.

[2] The instance of usury laws is so apt that it is easy to overestimate the importance of it. Such laws, were they enacted today, would probably be declared void by any court which would declare void an eight-hour law. Not only do they interfere very directly with the "freedom to contract," but they have no support in policy from any reputable economic authority. Their existence is therefore a glaring instance of the extent to which the legislature may lawfully go. But in the case of such laws not only is it true that they are thought wise by many reasonable persons, but they represent a theory which had an unbroken heredity upon the statute-books in those states in which they survive, long antedating the Constitution. *Laisser faire* never succeeded in destroying them, even in its prime, and today the current has set in the other direction. It is this history, therefore, which puts them beyond fear of attack. Still, they do remain as the most salient example of the power of the legislature to attempt to equalize the relative advantages of contracting parties, simply because one is needy and the other is not, and they show at least that in that case the Constitution permits such interference.

in Adair *v.* United States [1] the court goes no further than to say that membership in a union does not of itself have any relation to the welfare of the parties to the wage contract. Whether that be true or not, the decision does not assert that if it had some relation which made for the benefit of the workers at the expense of the employers, the legislature could not favor the workers. In Knoxville Iron Co. *v.* Harbison [2] the opinion certainly contemplated the equalization of the relative advantages between the parties. The court says: [3]

"Its tendency, though slight it may be, is to place the employer and employee upon equal ground in the matter of wages, and, so far as calculated to accomplish that end, it deserves commendation."

If a statute requiring wages to be paid in cash is valid on that account, there can be no distinction against one which has the same end in view in limiting the hours of work. The same reasoning seems necessary to support St. Louis Iron Mountain Ry. *v.* Paul,[4] in which a statute was sustained providing that a discharged employee could recover all his wages earned to date. For the state to intervene to make more just and equal the relative strategic advantages of the two parties to the contract, of whom one is under the pressure of absolute want, while the other is not, is as proper a legislative function as that it should neutralize the relative advantages arising from fraudulent cunning or from superior physical force. At one time the law did not try to equalize the advantages of fraud, but we have generally come to concede that the exercise of such mental superiority as fraud indicates, has no social value, but the opposite. It may well be that the uncontrolled exercise of the advantages derived from possessing the means of living of other men will also become recognized as giving no social benefit corresponding to the evils which result. If so, there is no ground for leaving it uncontrolled in the hands of individuals. Long since, the ownership of property which is devoted to certain public purposes has been limited by the state, even when the state has given no special franchises to its owner.[5] By an analogy, which was not perhaps conscious, the ownership of factories and certain other forms of capital is likewise now attended with certain

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[1] 208 U. S. 161.
[2] 183 U. S. 13.
[3] P. 20.
[4] 173 U. S. 404.
[5] Munn *v.* Illinois, 94 U. S. 113; Budd *v.* New York, 143 U. S. 517.

limitations special to such owners, as has been shown. It was at one time thought, and it is yet thought by some persons, that if the owner of such property keep within the limits of fraud and force, it is best not to meddle with him. No one can be insensible to the implications in a denial of his absolute rights. They involve social activity which may be used to destroy the initiative of the individual and those diversities between individuals which are the source of emulation and ambition. Yet no one today denies that to a certain degree we must face that possibility and answer the problems which it raises, with such wisdom as society can collectively muster. The question for the courts is not whether the problems have been wisely answered, but whether they can be answered at all, or whether they are taboo. So far as concerns laws limiting the hours of work, the present position seems quite untenable. Even assuming that women are not physically the equal of men,[1] the arguments against any regulation whatever of hours apply equally to men as to them. If the whole matter is dependent upon what is vaguely called "supply and demand," and if to favor an economic class in one way imposes on it some corresponding loss in another, it is because no deliberate and "artificial" change can make head against economic laws which work regardless of the individual, or the social, will. There are indubitably strong arguments in favor of such a position, but there are also cogent arguments *contra*. If the arguments opposed are in any case allowed to have enough cogency to "raise an issue," each case is a matter for special consideration. There are some cases in which the courts have conceded that such an issue is raised, and that throws the whole matter open for exclusive consideration, and for exclusive determination, by the legislature, unless the court is to step out of the rôle of interpreter of the Constitution and to decide the questions itself as another legislature.

In short, the whole matter is yet to such an extent experimental that no one can with justice apply to the concrete problems the yardstick of abstract economic theory. We do not know, and we cannot for a long time learn, what are the total results of such "meddlesome interference with the rights of the individual."[2] He would be as rash a theorist who should assert with certainty their

[1] Muller *v.* Oregon, 208 U. S. 412.

[2] Lochner *v.* People, 198 U. S. 45, 61.

beneficence, as he who would sweep them all aside by virtue of some pragmatical theory of "natural rights." The only way in which the right, or the wrong, of the matter may be shown, is by experiment; and the legislature, with its paraphernalia of committee and commission, is the only public representative really fitted to experiment. That the legislature may be moved by faction, and without justice, is very true, but so may even the court. There is an inevitable bias upon such vital questions in all men, and the courts are certainly recruited from a class which has its proper bias, like the rest. Indeed the legislature, though less courageous because it is less independent, is more genuinely representative. At present it is prone to evade its responsibility by throwing off all the odium of opposition on the court. If it could not do so, it would be compelled to meet the question more squarely and more fairly; and we should not have the inconsistent spectacle of a government, in theory representative, which distrusted the courage and justice of its representatives, and put its faith in a body which was, and ought to be, the least representative of popular feeling.

"No evils arising from such legislation could be more far-reaching than those that might come to our system of government, if the judiciary, abandoning the sphere assigned to it by the fundamental law, should enter the domain of legislation, and upon grounds of justice or reason or wisdom annul statutes that had received the sanction of the people's representatives." [1]

It is, therefore, in no sense as patrons or opponents of the wisdom of such efforts, that the courts may approach such laws. There no doubt comes a time when a statute is so obviously oppressive and absurd that it can have no justification in any sane polity.[2] If we are to abandon the theory that what is customary is

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[1] Atkin *v.* Kansas, 191 U. S. 207, 223.

[2] It is, for example, no answer to urge dialectically that if an eight-hour law is valid, then a six-hour, four-hour, or two-hour law would also be valid. It is no doubt true that the court must consider in the end the real effects of the law. That does not throw open the actual statute for consideration as *res integra*. No one now seriously believes in a four-hour law. If the control of men over natural energy became so great that in four hours a man could produce commodities equal to what he now produces in eight, it might be rationally contended that his "welfare" would be promoted by that limitation. The political body to determine that, under such changed economic conditions, would be the legislature. At present the court could, and must, take notice of the actual economic conditions to the extent necessary to determine whether the provision is merely perverse and absurd. Such a conclusion cannot honestly be held

permissible, perhaps the question is no more than of the temper in which the court awaits that time. However, that time has not come when the matter which is before them is one upon which men can, and do, diverge widely, and upon which the deliberate judgment of great numbers of quite reasonable persons is at variance with the majority of the court. Before the court the question is political, not economic; it is the question of where the power to pass upon such subjects should rest, whether in the legislature or in the whole people acting through the Constitution. If the subject be one already fairly within the field of rational discussion and interest, it would seem to be for the legislature. Such a subject, I submit, is the possible wisdom of an eight-hour law.

Learned Hand.

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when the limit is eight hours; nor has the court ever said this. They have overset the law by a relapse — if I may be pardoned the word — into the theory of "natural rights."